

Message Text

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ORIGIN EB-07

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DRAFTED BY EB/CBA/BP:WBLOCKWOOD:VJW

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L/EB - PTRIMBLE (SUBST)

EUR/CE - LHEICHLER

FTC - JFISCHBACH (SUBST)

JUSTICE - JDAVIDOW (SUBST)

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P R 101913Z JUN 75

FM SECSTATE WASHDC

TO AMEMBASSY BONN PRIORITY

USMISSION USBERLIN PRIORITY

USMISSION OECD PARIS

INFO USMISSION EC BRUSSELS

UNCLAS STATE 135001

E.O. 11652: N/A

TAGS: ETRD, GW

SUBJECT: PROPOSED US/FRG ANTITRUST COOPERATION AGREEMENT

REF: (A) US BERLIN 813; (B) BONN 05227; (C) BONN 0645

1. IN RESPONSE TO SEVERAL FRG PROPOSALS, USG HAS PREPARED PRELIMINARY DRAFT OF A US/FRG ANTITRUST COOPERATION AGREEMENT. PURPOSE OF THIS CABLE IS TO TRANSMIT PRELIMINARY DRAFT AND PERMIT FRG TIME FOR QUICK REVIEW OF THE DRAFT PRIOR TO JUNE 16-20 MEETING IN PARIS OF OECD COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES.
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2. ACTION: REQUEST EMBASSY BONN AND US MISSION BERLIN, RESPECTIVELY, DELIVER TEXT IMMEDIATELY TO DR. STAHL, MINISTRY FOR ECONOMIC AFFAIRS, AND DR. GUNTHER, PRESIDENT OF FEDERAL CARTEL OFFICE. AT SAME TIME INFORM THEM OF

SUGGESTION OF ASSISTANT ATTORNEY GENERAL THOMAS KAUPER AND FEDERAL TRADE COMMISSION CHAIRMAN LEWIS ENGMAN, BOTH MEMBERS OF USDEL TO OECD MEETINGS, THAT PRELIMINARY TALKS BE HELD BETWEEN APPROPRIATE US AND FRG DELEGATES ON EVENING OF TUESDAY, JUNE 17 AT SUITABLE OECD MEETING PLACE. UNFORTUNATELY, KAUPER AND ENGMAN MUST LEAVE PARIS MORNING OF FRIDAY, JUNE 20 AND CANNOT ATTEND MEETING THAT DAY AS HAD BEEN SUGGESTED EARLIER. REQUEST BONN AND BERLIN

REPORT BY CABLE (WITH INFO COPY TO US MISSION OECD) IF THIS ARRANGEMENT IS ACCEPTABLE TO STAHL AND GUNTHER. IF SO, REQUEST US MISSION RESERVE MEETING ROOM IN OECD OR US MISSION FOR EVENING OF JUNE 17.

3. FULL TEXT FOLLOWS:

QUOTE: AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY RELATING TO MUTUAL COOPERATION REGARDING RESTRICTIVE BUSINESS PRACTICES.

THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY, CONSIDERING THAT RESTRICTIVE BUSINESS PRACTICES AFFECTING THEIR DOMESTIC OR INTERNATIONAL TRADE ARE PREJUDICIAL TO THE ECONOMIC AND COMMERCIAL INTERESTS OF THEIR COUNTRIES,

-- CONVINCED THAT ACTION AGAINST THESE PRACTICES CAN BE MADE MORE EFFECTIVE BY THE REGULARIZATION OF COOPERATION BETWEEN THEIR ANTITRUST AUTHORITIES, AND HAVING REGARD, IN THIS RESPECT, TO THEIR TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION AND TO THE RECOMMENDATIONS OF THE COUNCIL OF THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE ADOPTED ON OCTOBER 5, 1967, AND ON DECEMBER 20, 1973.

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HAVE AGREED AS FOLLOWS:

ARTICLE I - DEFINITIONS. FOR PURPOSES OF THIS AGREEMENT THE FOLLOWING TERMS SHALL HAVE THE MEANINGS INDICATED:

-- (A) "ANTITRUST LAWS" SHALL MEAN, IN THE UNITED STATES OF AMERICA, THE SHERMAN ACT (15 U.S.C. ART. 1 ET SEQ.), THE CLAYTON ACT (15 U.S.C. ART. 12 ET SEQ.), THE FEDERAL TRADE COMMISSION ACT (15 U.S.C. ART. 41 ET SEQ.) AND THE WILSON TARIFF ACT (15 U.S.C. ARTS. 8 AND 9), AND IN THE FEDERAL REPUBLIC OF GERMANY, THE ACT AGAINST RESTRAINTS ON COMPETITION (INSERT CITATION), AS THESE ACTS HAVE BEEN AND MAY FROM TIME TO TIME BE AMENDED.

-- (B) "ANTITRUST AUTHORITIES" SHALL MEAN, IN THE UNITED STATES OF AMERICA, THE ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, AND, IN THE FEDERAL REPUBLIC OF GERMANY, THE FEDERAL CARTEL OFFICE AND THE COMPETITION POLICY OFFICE

OF THE ECONOMICS MINISTRY; AND SUCCESSOR AGENCIES IN EACH COUNTRY.

-- (C) "INFORMATION" SHALL INCLUDE REPORTS, DOCUMENTS, MEMORANDA, EXPERT OPINIONS, PUBLISHED AND UNPUBLISHED DECISIONS OF ADMINISTRATIVE AND JUDICIAL BODIES, AND OTHER WRITTEN OR COMPUTERIZED RECORDS.

-- (D) "RESTRICTIVE BUSINESS PRACTICES" SHALL INCLUDE ALL PRACTICES WHICH MAY VIOLATE THE ANTITRUST LAWS OF EITHER PARTY.

ARTICLE II - OBLIGATIONS TO RENDER ASSISTANCE.

2.1 EACH PARTY AGREES TO RENDER ASSISTANCE TO THE OTHER PARTY, TO THE EXTENT SET FORTH IN THIS AGREEMENT, IN CONNECTION WITH (A) INVESTIGATIONS AND CIVIL, CRIMINAL AND ADMINISTRATIVE PROCEEDINGS WHICH RELATE TO RESTRICTIVE BUSINESS PRACTICES, AND (B) STUDIES RELATED TO COMPETITION POLICY AND POSSIBLE CHANGES IN ANTITRUST UNCLASSIFIED

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LAWS, AND ACTIVITIES RELATED TO THE ANTITRUST WORK OF INTERNATIONAL ORGANIZATIONS.

-- 2.2 EACH PARTY AGREES THAT IT WILL PROVIDE THE OTHER PARTY WITH ANY SIGNIFICANT INFORMATION WHICH COMES TO THE ATTENTION OF EITHER OF ITS ANTITRUST AUTHORITIES AND WHICH INVOLVES RESTRICTIVE BUSINESS PRACTICES WHICH, REGARDLESS OF ORIGIN, HAVE A SUBSTANTIAL EFFECT ON THE DOMESTIC OR INTERNATIONAL TRADE OF SUCH OTHER PARTY.

-- 2.3 EACH PARTY AGREES THAT, UPON REQUEST OF THE OTHER PARTY, IT WILL OBTAIN FOR AND FURNISH SUCH OTHER PARTY WITH SUCH INFORMATION AS SUCH OTHER PARTY MAY REQUEST IN CONNECTION WITH A MATTER REFERRED TO IN SECTION 2.1 (A) OR (B), AND WILL OTHERWISE PROVIDE ADVICE AND ASSISTANCE IN CONNECTION THEREWITH. SUCH ADVICE AND ASSISTANCE SHALL INCLUDE, BUT NOT NECESSARILY BE LIMITED TO, COOPERATION IN THE ENFORCEMENT OF THE ANTITRUST LAWS OF THE REQUESTING PARTY, INCLUDING, WHERE EITHER OF THE ANTITRUST AUTHORITIES OF THE REQUESTED PARTY HAS DEALT WITH A RESTRICTIVE BUSINESS PRACTICE INVOLVED IN THE REQUEST, THE EXCHANGE OF INFORMATION AND A SUMMARY OF ITS EXPERIENCE RELATING THERETO. SUCH ASSISTANCE SHALL ALSO INCLUDE THE ATTENDANCE OF PUBLIC OFFICIALS OF THE

REQUESTED PARTY AS WITNESSES, AND THE PRODUCTION OF FILES AND RECORDS OF THE ANTITRUST AUTHORITIES OF THE REQUESTED PARTY (OR DULY AUTHENTICATED OR CERTIFIED COPIES THEREOF), WHICH ARE ESSENTIAL TO INVESTIGATIONS OR PROCEEDINGS REFERRED TO IN SECTION 2.2(A).

-- 2.4 WHERE THE ENFORCEMENT OF THE ANTITRUST LAWS OF ONE PARTY WILL AFFECT IMPORTANT INTERESTS OF THE OTHER PARTY, SUCH PARTY WILL NOTIFY SUCH OTHER PARTY AND WILL CONSULT AND COORDINATE ENFORCEMENT EFFORTS WITH SUCH OTHER PARTY TO THE EXTENT APPROPRIATE UNDER THE CIRCUMSTANCES.

ARTICLE III - EXCEPTIONS TO OBLIGATIONS TO RENDER ASSISTANCE.

-- 3.1 EITHER PARTY MAY DECLINE IN WHOLE OR IN PART, TO RENDER ASSISTANCE UNDER THIS AGREEMENT, OR TO COMPLY UNCLASSIFIED

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WITH ANY REQUEST FOR ASSISTANCE UNDER THIS AGREEMENT, SUBJECT TO SUCH TERMS AND CONDITIONS AS THE COMPLYING PARTY MAY ESTABLISH, IF SUCH PARTY DETERMINES THAT:
(A) COMPLIANCE WOULD BE INCONSISTENT WITH ITS SECURITY, PUBLIC POLICY OR OTHER SUBSTANTIAL NATIONAL INTERESTS;
(B) THE REQUESTING PARTY WOULD NOT BE OBLIGATED TO COMPLY WITH SUCH REQUEST, BY REASON OF THIS SECTION 3.1, IF SUCH REQUEST HAD BEEN MADE BY THE REQUESTED PARTY;
(C) COMPLIANCE WOULD BE PROHIBITED BY THE DOMESTIC LAW OF THE COMPLYING PARTY; OR (D) THE REQUESTING PARTY IS UNABLE TO COMPLY WITH TERMS OR CONDITIONS ESTABLISHED BY THE REQUESTED PARTY, INCLUDING CONDITIONS DESIGNED TO PROTECT THE CONFIDENTIALITY OF INFORMATION REQUESTED.
A PARTY DECLINING A REQUEST FOR ASSISTANCE SHALL EXPLAIN ITS REASONS FOR DOING SO IN WRITING AT THE TIME IT DECLINES TO ACT.

-- 3.2 NEITHER PARTY SHALL BE OBLIGATED TO EMPLOY COMPULSORY POWERS IN ORDER TO OBTAIN INFORMATION FOR, OR OTHERWISE PROVIDE ADVICE AND ASSISTANCE TO, THE OTHER PARTY PURSUANT TO THIS AGREEMENT.

-- 3.3 NEITHER PARTY SHALL BE OBLIGATED TO UNDERTAKE EFFORTS IN CONNECTION WITH THIS AGREEMENT WHICH ARE LIKELY TO REQUIRE SUCH SUBSTANTIAL UTILIZATION OF PERSONNEL OR RESOURCES AS TO UNREASONABLY BURDEN ITS OWN ENFORCEMENT DUTIES.

ARTICLE IV - NONINTERFERENCE. EACH PARTY AGREES THAT, UPON REQUEST BY THE OTHER PARTY, IT WILL ACT, TO THE EXTENT POSSIBLE UNDER ITS DOMESTIC LAW AND PUBLIC POLICY, SO AS NOT TO INHIBIT OR INTERFERE WITH ANY INVESTIGATION OR PROCEEDING UNDER THE ANTITRUST LAWS OF SUCH OTHER

PARTY; AND ALSO THAT IT WILL NOT TAKE ANY ACTION TO PREVENT ANY BUSINESS ENTITY OR OTHER PERSON FROM COOPERATING IN CONNECTION WITH ANY SUCH INVESTIGATION OR PROCEEDING.

ARTICLE V - OBLIGATION TO PROTECT CONFIDENTIALITY.
THE CONFIDENTIALITY OF INFORMATION TRANSMITTED SHALL BE MAINTAINED IN ACCORDANCE WITH THE LAW OF THE PARTY RECEIVING SUCH INFORMATION, SUBJECT TO SUCH TERMS AND CONDITIONS
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AS MAY BE ESTABLISHED BY THE COMPLYING PARTY FURNISHING SUCH INFORMATION.

ARTICLE VI - IMPLEMENTATION OF AGREEMENT.

-- 6.1 THE TERMS OF THIS AGREEMENT SHALL BE IMPLEMENTED, AND OBLIGATIONS UNDER THIS AGREEMENT SHALL BE DISCHARGED, BY THE RESPECTIVE ANTITRUST AUTHORITIES OF THE PARTIES, WHICH SHALL DEVELOP APPROPRIATE PROCEDURES IN CONNECTION THEREWITH INCLUDING PROCEDURES FOR REFERRAL OF A REQUEST FOR ASSISTANCE PURSUANT TO THIS AGREEMENT TO OTHER APPROPRIATE AUTHORITIES (INCLUDING STATE AND LOCAL GOVERNMENTS), WHERE THE REQUESTED ANTITRUST AUTHORITY IS NOT THE APPROPRIATE AUTHORITY TO COMPLY WITH SUCH REQUEST.

-- 6.2 REQUESTS FOR ASSISTANCE PURSUANT TO THIS AGREEMENT SHALL BE MADE OR CONFIRMED IN WRITING, SHALL BE REASONABLY SPECIFIC AND SHALL INCLUDE THE FOLLOWING INFORMATION AS APPROPRIATE: (A) THE ANTITRUST AUTHORITY OR AUTHORITIES TO WHOM THE REQUEST IS DIRECTED; (B) THE ANTITRUST AUTHORITY OR AUTHORITIES MAKING THE REQUEST; (C) THE NATURE OF THE INVESTIGATION, PROCEEDING, STUDY OR OTHER ACTIVITY INVOLVED; (D) THE OBJECT OF AND REASON FOR THE REQUEST; AND (E) THE NAMES AND ADDRESSES OF ANY BUSINESS ENTITIES OR OTHER PERSONS CONCERNED IN ANY INVESTIGATION OR PROCEEDING. SUCH REQUESTS MAY SPECIFY THAT PARTICULAR PROCEDURES BE FOLLOWED OR THAT A REPRESENTATIVE OF THE REQUESTING PARTY BE PRESENT AT REQUESTED PROCEEDINGS OR IN CONNECTION WITH OTHER REQUESTED ACTIONS.

-- 6.3 THE REQUESTING PARTY SHALL BE ADVISED, TO THE EXTENT FEASIBLE, OF THE TIME AND PLACE OF ACTION TO BE TAKEN BY THE REQUESTED PARTY IN RESPONSE TO ANY REQUEST FOR ASSISTANCE UNDER THIS AGREEMENT.

-- 6.4 IF ANY SUCH REQUEST CANNOT BE FULLY COMPLIED WITH, THE REQUESTED PARTY SHALL PROMPTLY NOTIFY THE REQUESTING PARTY OF ITS REFUSAL OR INABILITY TO SO COMPLY, STATING THE GROUNDS FOR SUCH REFUSAL, ANY TERMS OR CONDITIONS WHICH IT MAY ESTABLISH IN CONNECTION THEREWITH AND
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ANY OTHER INFORMATION WHICH IT CONSIDERS RELEVANT TO THE
SUBJECT OF THE REQUEST.

ARTICLE VII - PAYMENT OF EXPENSES. ALL DIRECT EXPENSES
INCURRED BY THE REQUESTED PARTY IN COMPLYING WITH A
REQUEST FOR ASSISTANCE UNDER THIS AGREEMENT SHALL, UPON
REQUEST, BE PAID OR REIMBURSED BY THE REQUESTING PARTY.
SUCH DIRECT EXPENSES SHALL INCLUDE EXPENSES OF WITNESSES;
FEES OF EXPERTS; COSTS OF INTERPRETERS; TRAVEL AND
MAINTENANCE EXPENSES OF WITNESSES, EXPERTS, INTERPRETERS
AND EMPLOYEES OF ANTITRUST AUTHORITIES; TRANSCRIPT AND
REPRODUCTION COSTS; AND OTHER INCIDENTAL EXPENSES;
BUT SHALL NOT INCLUDE ANY PART OF THE SALARIES OF
EMPLOYEES OF ANTITRUST AUTHORITIES.

ARTICLE VIII - ENTRY INTO FORCE AND TERMINATION.

-- 8.1 THIS AGREEMENT SHALL ENTER INTO FORCE ONE
MONTH FROM THE DATE ON WHICH THE PARTIES SHALL HAVE
INFORMED EACH OTHER IN AN EXCHANGE OF DIPLOMATIC NOTES
THAT ALL THE DOMESTIC LEGAL REQUIREMENTS FOR SUCH ENTRY
INTO FORCE HAVE BEEN FULFILLED.

-- 8.2 THIS AGREEMENT SHALL REMAIN IN FORCE UNTIL
TERMINATED UPON SIX MONTHS' NOTICE GIVEN IN WRITING BY
ONE OF THE PARTIES TO THE OTHER. END QUOTE. KISSINGER

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